United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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74-1644

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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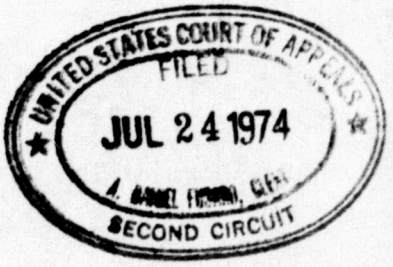
:
JOHN SHUTTLE,
:
Petitioner-Appellant,
:
-against-
:
JULIUS MOEYKENS,
:
Respondent-Appellee.
:
- x

Docket No. 74-1644



REPLY BRIEF FOR APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHN SHUTTLE, Petitioner-Appellant, -against- JULIUS MOEYKENS, Respondent-Appellee.	Docket No. 74-1644

REPLY BRIEF OF PETITIONER-APPELLANT

Petitioner-Appellant, John Shuttle ("Shuttle"), respectfully submits this brief in reply to the brief submitted by Respondent-Appellee ("the State"). Very few points in the State's brief require comment. There is one factual issue, however, that demands reply.

The State in its "Counter Statement of the Case" asserts that there is no truth to Shuttle's claim that Judge Connarn had previously testified against Shuttle in federal court relating to prosecutions against Shuttle (Br., viii, n. 4).*

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* References so indicated are to the State's brief.

Not only does the State reject Shuttle's sworn testimony that Judge Connarn had testified against him in a federal proceeding but it also ignores the fact that the Supreme Court of Vermont acknowledged that Judge Connarn had so testified. In re Shuttle, 131 Vt. 457, 306 A.2d 667 (1973). In reviewing the numerous contacts between Shuttle and Judge Connarn, the Supreme Court of Vermont declared (306 A.2d 669):

> "Judge Connarn represented the state as attorney general before 1962 in making an argument in court in a post-conviction review proceeding brought by the petitioner. It also appears that the petitioner at one time was before Judge Connarn as a litigant, and the judge was subpoenaed to testify in federal court relating to prosecutions against the petitioner to that court for review." (Emphasis added.)

Thus, operating from a false premise, the State seeks to minimize the denial of Shuttle's basic right to be judged by a tribunal free of any possible bias.

POINT I
SHUTTLE PROPERLY RAISED THE ISSUE OF BIAS BEFORE HE WAS SENTENCED

The State now argues for the first time that Shuttle should be barred from raising the issue of

Judge Connarn's prejudice because Shuttle allegedly had not laid a proper basis before Judge Connarn. At the same time, however, it agrees with Shuttle that he has exhausted his state court remedies (Br., vi; Shuttle's Original Br., 6). The State's position thus is that despite the bias and prejudice of Judge Connarn, Shuttle cannot seek federal court relief.

In reality, however, Shuttle has consistently and doggedly raised the issue of Judge Connarn's bias and prejudice in both the prior state and federal proceedings. In fact, it is not Shuttle who is presenting his claim of bias for the first time -- rather, it is the State that is for the first time urging the lack of proper basis to raise the issue. That position is factually untenable.

POINT II
ALL THE CONTACTS TAKEN TOGETHER DEMONSTRATE THE REQUISITE BIAS AND PREJUDICE

The State argues that Shuttle has failed to show that the prior contacts between himself and Judge Connarn were of significance. To support its claim, the State adopts the tactic of "divide and conquer."

Although it acknowledges the extensive prior contacts, it treats each contact between Shuttle and Judge Connarn separately and then urges that the fact that they all converge and are present in one case is without further significance. It thus ignores the synergistic effect demonstrated by the record.*

Not only has the State mistakenly dismissed as untrue the fact that Judge Connarn had testified against Shuttle in a federal proceeding, but it has discounted the role of Norbert J. Towne with respect to the question of Judge Connarn's bias (Br., 12). It does so on two grounds: first, the issue of Towne's "believability" never arose (Br., 14); and second, the relationship between Judge Connarn and Towne was merely one of "business" (Br., 15). The State's attempt to minimize the importance of the contact between Judge Connarn and Towne is gross oversimplification.

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* The State acknowledges that Judge Connarn had previously appeared in his "prosecutorial function" against Shuttle in a post-conviction relief proceeding (Br., 10). The State also admits that Judge Connarn had sat in judgment of Shuttle on prior occasions (Br., 10-12; 14).

The fact that Towne's credibility was never in issue is irrelevant. The critical fact is that one of Judge Connarn's professional colleagues and friends was directly involved in the crime for which Shuttle was convicted. The attitude of Judge Connarn towards Shuttle was affected by this involvement -- not by the possible issue of Towne's credibility. Moreover, to brush off the relationship between Judge Connarn and Towne as merely a "business relationship" (Br., 15) is misleading. The relationship between Judge Connarn and Towne was not that of an employer and employee or a master and servant. Both prior and after Judge Connarn's admission to practice, Judge Connarn was under the professional tutelage of Towne, from which a professional association of substantial duration arose.

We submit that the isolated consideration of each of these numerous contacts between Shuttle and Judge Connarn is inappropriate. The fact is that all of these contacts did coalesce in one judicial setting and created a whole greater than the sum of its parts. This synergistic effect was clearly demonstrated in the record.

The State maintains that the harsh sentence imposed by Judge Connarn for the crime of false token of an $85 check and the amount of bail which had been set by Judge Connarn were justified by the Vermont statutes. In support of the sentence imposed, 3-1/2 to 10 years for one count of false token of an $85 check, the State asserts that the availability of lengthy maximum sentences is to enable a court to deal flexibly with "recidivist criminals like [Shuttle]" (Br., 12, n. 7). The State offers no authorities to support this conclusion. It is submitted that a more reasonable interpretation of the flexible penalties in the statute is to enable a court to mete out appropriate punishment depending upon the nature, consequences and seriousness of the crime as well as the personal circumstances of the defendant. Applied to the present facts, the length of Shuttle's sentence for the crime of false token of an $85 check indicates a callous disregard on the part of Judge Connarn of the nature of the crime.

Furthermore, the State attempts to rationalize the large amount of bail which Judge Connarn had set by

selectively quoting from 13 V.S.A. §7554(b). The State cryptically notes that in setting bail, the statute directs the judge to consider "the individual's record of convictions along with several other factors" (Br., 12, n. 7). (Emphasis added.) The unquoted additional factors are the nature and circumstances of the alleged crime, the weight of the available evidence, the family ties, employment, financial resources, character and mental record of the accused, the length of his community residence and the accused's record of appearances at court proceedings. The statute declares that these factors shall be considered by the judge "[i]n determining what conditions of release will reasonably assure appearance and will not constitute a danger to the public, . . ." (emphasis added). If these criteria had been impartially applied, the amount of bail imposed would have been substantially lower and more reasonably related to the nature of the crime.

In sum, the evidence discloses a pattern of contacts over the years between Shuttle and Judge Connarn, the result of which obviates any possible appearance of judicial disinterestedness and detachment.

In addition, the amount of bail set and the length of sentence imposed for Shuttle's conviction of the crime of false token of an $85 check, demonstrates that the actual bias and prejudice of Judge Connarn against Shuttle manifested itself in these proceedings. Even-handed justice has not been impartially administered.

CONCLUSION

The order appealed from should be reversed and the writ granted.

Respectfully submitted,

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Michael C. Gilbert,
of Counsel

July 24, 1974

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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JOHN SHUTTLE, :

Petitioner-Appellant, :

-against- : Docket No. 74-1644

JULIUS MOEYKENS, : AFFIDAVIT OF MAILING

Respondent-Appellee. :

- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

WALDO B. WARNER, being duly sworn, deposes and says:

I am over the age of eighteen (18) years and am not a party to this action.

On the 24th day of July, 1974, I served three copies of the Reply Brief for Appellant in this action on Raymond L. Betts, Jr., Assistant Attorney General of the State of Vermont, Pavilion Office Building, Montpelier, Vermont 05602, by depositing true copies thereof in a properly addressed postpaid wrapper in a regularly maintained official depository under the exclusive care and custody of the United States Post Office Department located in the City, County and State of New York.

Waldo B. Warner

Waldo B. Warner

Sworn to before me this
24th day of July, 1974.

Barbara J. Scannapieco

Notary Public

BARBARA J. SCANNAPIECO
Notary Public, State of New York
No. 43-2003050
Qualified in Richmond County